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Supreme Court, U.S.
FILED
JUL 15 2002
OFFICE OF THE CLERK

No. 01-1503

In the Supreme Court of the United States

COURT OF COMMON PLEAS OF
CUYAHOGA COUNTY, OHIO
Petitioner,

v.

JOSEPH M. POPOVICH, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 12 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY
State Solicitor
STEPHEN P. CARNEY*
Associate Solicitor
**Counsel of Record*
RICHARD N. COGLIANESE
ROBERT L. STRAYER
Assistant Solicitors
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980
Counsel for *Amici* States

2129

WILLIAM H. PRYOR, JR.
Attorney General
State of Alabama

M. JANE BRADY
Attorney General
State of Delaware

EARL I. ANZAI
Attorney General
State of Hawaii

STEVE CARTER
Attorney General
State of Indiana

RICHARD P. IEYOUB
Attorney General
State of Louisiana

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

ANABELLE RODRIQUEZ
Attorney General
Commonwealth of
Puerto Rico

MARK BARNETT
Attorney General
State of South Dakota

PAUL G. SUMMERS
Attorney General
State of South Tennessee

JOHN CORNYN
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

QUESTIONS PRESENTED

1. Does Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), exceed Congress's enforcement authority under section 5 of the Fourteenth Amendment, thereby failing to validly abrogate the States' Eleventh Amendment immunity from private damage claims?

2. Does the abrogation analysis of Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), differ when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns?

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STATEMENT OF *AMICI* INTEREST

The State of Ohio, joined by twelve other *amici* States, urges the Court to grant the petition, and to finally resolve whether the States retain their sovereign immunity from damages lawsuits filed under Title II of the Americans with Disabilities Act (ADA). In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2000), this Court held that Congress had no power to abrogate the States' immunity from suits brought under the ADA's Title I, concerning employment. The Court found that Title I did not fall under Congress's power to enforce constitutional rights, as Title I created rights and remedies far beyond what the Constitution requires, and Congress was not responding to a pattern of previous constitutional violations by the States. In *Garrett*, the Court had granted certiorari to address the ADA's Title II as well, but the Court did not reach the issue, leaving the lower courts to address Title II again. *Garrett*, 531 U.S. at 360 n.1 (2001).

Since *Garrett*, the circuit courts of appeals have not only remained split on the Title II issue, but the split has taken a new and complicated direction, as shown by the Sixth Circuit's decision below. While most circuits have fallen on one side of the split or the other—*i.e.*, they have found that Title II validly abrogates, or that Title II does not validly abrogate—the Sixth Circuit has now joined the Second Circuit in saying that Title II plaintiffs may overcome State immunity *in certain factual circumstances*. The Second Circuit allows Title II plaintiffs to proceed in federal court if they show that the State's alleged Title II violation "was motivated by discriminatory animus or ill will towards the disabled." *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98, 111 (2d Cir. 2001). The Sixth Circuit has drawn a different line, but it has also adopted an as-applied approach to jurisdiction: it held that States are immune from Title II cases that are based upon "equal

protection-type claims," but it allows plaintiffs to overcome immunity if they advance a "due process-type claim." Pet. App. 8a-17a (reported as *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc)). In this case, the Sixth Circuit held that it was unclear, even after a jury trial, whether plaintiff Popovich did have a "due process-type claim" or merely an "equal protection" one, so the court remanded for a new trial to resolve the question. Pet. App. 19a, 21a-23a.

The *amici* States write because we have a great interest in both questions presented here. We of course seek to resolve the issue of our immunity from Title II suits, as the lower courts remain split on this important issue. And we have an equally great interest in asking the Court to reject the whole notion of an "as-applied" approach to questions of Congressional abrogation of our immunity. Whether we States win or lose in challenging abrogation under a given statute, what we need most is certainty. Indeed, all parties, especially plaintiffs who need to know where to file a case, suffer when the fundamental question of jurisdiction is subject to an unworkable case-by-case approach. Thus, this Court's guidance is urgently needed.

REASONS FOR GRANTING THE WRIT

I. The Court Should Decide Whether States Are Immune From Damages Claims Filed Under Title II Of The Americans With Disabilities Act.

By any measure, the first question presented—whether Congress validly abrogated the States' immunity when it passed Title II of the ADA—warrants this Court's review. The circuits are split, and the issue is one of great importance. The ongoing uncertainty harms States and plaintiffs alike, and the issue should now be resolved.

A. The Circuits Remain Split On The Question Of Immunity From Title II Suits, And The Sixth Circuit's As-Applied Approach Complicates The Split.

The circuits were already split on this question when the Court decided *Garrett*, *see Garrett*, 531 U.S. at 363, and since then, the lower courts have remained divided. The Fifth, Eighth, and Tenth Circuits have held that Title II does not abrogate the States' immunity. *See Reickenbacker v. Foster*, 274 F.3d 974, 984 (5th Cir. 2001); *Randolph v. Rogers*, 253 F.3d 342, 345 n.4 (8th Cir. 2001); *Thompson v. State of Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1960 (2002). The Ninth Circuit has re-affirmed its pre-*Garrett* view that Title II does validly abrogate the States' immunity. *Hason v. Medical Bd. of California*, 279 F.3d 1167, 1171 (9th Cir. 2002).

The Second Circuit broke new ground by finding that abrogation is valid for a subset of Title II cases—and importantly, the Second Circuit established a fact-bound inquiry, based on the defendant's motivation, to determine whether the case would be allowed in federal court or not. *See Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98 (2d Cir. 2001). If a plaintiff can establish that the State's alleged Title II violation "was motivated by discriminatory animus or ill will towards the disabled," the State is not entitled to Eleventh Amendment immunity in that particular case. *Id.* at 111.

The Sixth Circuit has now joined the Second Circuit in approaching immunity case-by-case, but it drew a different line, attempting to classify Title II claims into those that "sound in equal protection" and those that raise "due process-type claims." Under this taxonomy, States are immune from the equal protection-type claims, but are subject to federal jurisdiction over the due process-type claims. Pet. App. at

12a-17a. While the exact contours of this rule are unclear, as discussed in Part II below, the Sixth Circuit has plainly held that some Title II claims may proceed, while others may not.

Thus, the circuits are plainly split, and the issue is undoubtedly of great importance to all sides in the debate. Indeed, plaintiff-respondent Popovich has cross-petitioned for certiorari in this case, *see* Petition in No. 01-1517, and in another petition raising this same issue, the United States has acknowledged that "the question of Congress's power to abrogate the States' Eleventh Amendment immunity for claims under Title II of the Disabilities Act is an important question that may merit review by this Court at the appropriate time and in the appropriate case." 4-15-02 Brief of the United States in Opposition, *Thompson v. State of Colorado,* No. 01-1024 at 6, *cert. denied,* 122 S. Ct. 1960 (2002).

The *amici* States submit that this is the appropriate time and case, and this important issue should now be resolved.

B. This Case Is A Good Vehicle To Resolve The Title II Issue.

Because the Title II abrogation question is plainly ripe for review, the issue becomes whether this case is a good vehicle for that review. This case stands apart from those that answer the abrogation question with a simple yes or no, as the court below has adopted a factbound approach.

The Sixth Circuit's use of an as-applied, split-the-difference approach is precisely why this case is a superior vehicle, as it not only allows the Court to resolve the basic Title II question, but it also allows the Court to provide much-needed guidance to the lower courts on the second question presented. As shown in Section II below, that

question equally warrants review, as the lower courts need guidance on whether the Section Five/Eleventh Amendment inquiry should ever be resolved on an as-applied basis.

II. The Court Should Decide Whether The *Boerne* Analysis Allows For The Abrogation Issue To Be Resolved On An As-Applied Basis.

The Court should also grant the petition to review the second question presented, as the Sixth Circuit's as-applied approach conflicts with this Court's recent Eleventh Amendment cases. The fact-bound approach creates an unworkable scheme whereby the fundamental question of jurisdiction—which should of course be resolved pretrial and even pre-discovery—turns on factual disputes that may even remain unresolved until after a jury trial on the merits. This approach is a growing problem in the lower courts, so the issue warrants review now.

A. The Sixth Circuit's As-Applied Approach To Eleventh Amendment Immunity Conflicts With This Court's Decisions, And It Conflicts With The Fundamental Nature Of Jurisdiction.

In *Garrett*, the Court accurately described its Section Five analysis as a set of "now familiar principles." *Garrett*, 531 U.S. at 365. Under those principles, the Court takes several steps to determine whether a given Congressional enactment is justified by Congress's power, under Section Five of the Fourteenth Amendment, to enforce constitutional guarantees. First, the Court "identif[ies] with some precision the scope of the constitutional right at issue." *Id.* Second, the Court "examine[s] whether Congress identified a history and pattern of unconstitutional" State action in the area in question (such as employment discrimination against the disabled), as Congress's Section Five power "is

appropriately exercised only in response to state transgressions." *Id.* at 368. Third, whether the alleged "pattern" of State misbehavior seems great or small, the Court compares Congress's statutory remedy to the constitutional problem, to see if the remedial scheme is "congruent and proportional" to the problem it addresses. *Id.* at 374.

The Court has applied these principles several times in recent years, and several times Congress's handiwork has been found wanting. *See id.* at 360 (ADA Title I); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Patent Remedy Act); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act). In each case, the Court held that the statute at issue was not a valid exercise of Congress's enforcement power, because Congress was not responding to a pattern of State constitutional violations, and each statute granted rights and remedies far beyond what the Constitution requires.

Equally important, in each of these cases, the Court reviewed and rejected each challenged statute on its face; it did not measure congruence and proportionality as applied to a particular plaintiff's case. To be sure, the Court never used the terms "facial" or "as-applied" in discussing the challenges, but everything about the Court's analysis is inconsistent with the idea of as-applied abrogation. The question has always been whether Congress had the power to subject States to suit under a certain statute, or if Congress's act was proportional to the constitutional concern. The Court has never looked to any individual claim or measured a particular claim against the relevant constitutional guarantee.

In *Garrett*, for example, the Court compared Title I's *statutory provisions* to the Constitution's equal protection guarantees—it did not compare Ms. Garrett's allegations to the constitutional standard. *Garrett*, 531 U.S. at 365-68; *compare* Pet. App. at 11a-12a ("In defining the 'metes and bounds' of the constitutional right before us, we must consider whether plaintiff's due process-type claim to participate fully in the hearing in his child custody suit is an exception to Eleventh Amendment immunity.").

Moreover, when the Court has rejected abrogation attempts, it has never left open the possibility that some future plaintiff might "revive" a piece of the fallen statute if *her claim involved facts* that implicated an enforceable constitutional right. Under *Kimel*, State employees simply may not pursue ADEA damages claims against a State in federal court—even if the employee alleges that the State's treatment of her violated a rational-basis standard.

The Sixth Circuit did not cite any decision from this Court for the general notion that Congressional abrogation could be determined on an as-applied basis. Instead, the court simply stated that in defining the "metes and bounds" of the constitutional right at issue, it would examine "whether plaintiff's due process-type claim to participate fully in the hearing in his child custody suit" is the type of claim that would justify Congressional abrogation of immunity. The Sixth Circuit then cited several cases showing that this Court has in fact afforded due process protections to parents facing a loss of custody over their children. Pet. App. at 11a-13a, citing, *e.g.*, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981). The court concluded that "[a]s applied to the case before us, the 'participation' requirement of Title II serves to protect Popovich's due process right to a meaningful hearing." Pet. App. at 17a. Thus, said the court, Congress had valid Section Five power to require

accommodation in "child custody cases involving hearing-impaired parents." *Id.*

But Title II of course governs far more than "child custody cases involving hearing-impaired parents," and the Sixth Circuit's narrower approach cannot be squared with this Court's approach in *Garrett* and the other immunity cases. The Sixth Circuit's view essentially says that if a Congressional act fails the proportionality and congruence test, the courts should "trim back" the reach of the statute, so that federal courts have jurisdiction over those claims that are individually "proportional and congruent" to federal constitutional guarantees.

This is not to say that courts may not consider the Due Process clause as an alternate ground for justifying abrogation under Title II, but if courts do so, such a review should still comport with the systematic analysis mandated by *Boerne* and *Garrett*. For example, in *Florida Prepaid*, the Court examined whether the Patent Remedy Act could be justified as an enforcement of patentees' due process right not to be deprived of their patent-property, or more specifically, the patentees' due process right against unremedied patent infringement. *See* 527 U.S. at 639-47. Importantly, the Court there asked whether the Patent Remedy Act was a response to a *pattern* of unremedied patent infringement; it did not ask whether the claims of plaintiff College Savings Bank might implicate a constitutional claim.

Further, even if the Sixth Circuit was justified in looking only at "child custody cases involving hearing-impaired parents," as opposed to measuring Title II generally, it still should have asked whether Congress acted in response to a pattern of States' unconstitutional (and unremedied) violations in that area. While no such pattern exists here, the

more important point is that the court asked the wrong question.

Because the Sixth Circuit's decision cannot be reconciled with this Court's holdings in *Garrett*, *Boerne*, *Florida Prepaid*, and the other immunity cases, this case merits review.

B. The Sixth Circuit's As-Applied Approach Is Unworkable, Because It Requires Full Factfinding On A Claim's Merits, And Sometimes Even A Trial, Before The Trial Court Can Decide Whether It Has Jurisdiction Over The Claim.

The Sixth Circuit's as-applied approach to abrogation must be wrong, as it puts the merits cart before the jurisdictional horse. That is, the appeals court's view requires factfinding on a claim's merits, so that a court may determine if a plaintiff raises "due process-type claims"—but such factfinding clashes with the idea that Eleventh Amendment immunity is *jurisdictional*, and immunity should protect States from the indignity of suit and from pre-trial factfinding. *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996).

While the decision below did not explain precisely how a court is to review claims for possible "due process type" status, it is hard to avoid the conclusion that some factfinding, leading up to some type of mini-trial or full-blown trial, will be needed. Indeed, the Sixth Circuit's treatment of Popovich's own claim demonstrates how far such factfinding will go. In this case, the district court had already held a full jury trial on Popovich's claims, yet the court of appeals was still unable to classify his claims as "equal protection-type" or "due process-type." The court could not be sure, it said, because Popovich framed his

claims under both types of "theories," and the jury's verdict may have been permissibly premised upon due process, or impermissibly premised upon equal protection. Thus, the court of appeals ordered a remand and re-trial, so that a jury could determine, under better-tailored jury instructions, whether Popovich had a due process-type claim after all. Pet. App. at 19a ("We reverse and remand the case for a new trial because the charge to the jury appears to permit the jury to find in favor of the plaintiff if it finds discrimination against him or exclusion from public proceedings based on equal protection principles.").

In ordering a remand, and ordering a *jury* to determine whether Popovich had a due process-type claim or not, the Sixth Circuit lost sight of the fact that immunity-or-abrogation is a *jurisdictional* issue, and as such should be decided (1) by a judge and (2) before a determination on the merits. While courts do have jurisdiction to allow some factfinding as needed to determine whether jurisdiction exists, that limited jurisdiction usually explores whether minimum contacts exist, or other preliminary issues; it does not bootstrap in a resolution of the merits. In this case, if the jury determines on remand that it does not find a "due process-type claim," that finding has implications beyond showing Popovich loses on the merits. Since the Sixth Circuit held that *jurisdiction* exists only if Popovich has a due process claim, then a jury finding against him on such a claim implies the court did not have jurisdiction over the claim. But that will be far too late for the State to avoid the expense and indignity of suit.

Some cases decided since *Popovich* suggest that some claims could be dismissed at the pleading stage. For example, in *Carten v. Kent State Univ.*, 282 F.3d 391 (6th Cir. 2002), the Sixth Circuit held that a plaintiff's claim did not overcome the State's immunity because he raised "no allegations that sound in due process," as that plaintiff

complained only "that he was denied access to public education;" he did not complain that he was denied "an opportunity to participate meaningfully in judicial proceedings." *Carten*, 282 F.3d at 395. And in an unreported decision, the Sixth Circuit upheld dismissal of a complaint where a prisoner's "allegations more closely resemble[d] an equal protection claim than a due process claim." *Moore v. Chavez*, 2002 U.S. App. Lexis 5205 (6th Cir. March 26, 2002), *6. However, these cases mean only that dismissal is possible when a plaintiff does not even *allege* a "due process type claim;" such a rule offers little solace to States that will now face plaintiffs who know, post-*Popovich*, to shout "due process" to survive a motion to dismiss.

Further, while the decision below said that abrogation was valid in "child custody cases involving hearing-impaired parents," it left open whether its reasoning would open the door to other claims that, in certain factual settings, might implicate recognized fundamental due process rights. The court cited only cases involving child custody, suggesting that the subject matter of the state-court case was crucial, but surely plaintiffs will argue that any case concerning courthouse access raises a due process claim. Or perhaps any claim concerning access to any government building or hearing is eligible for the category of "due process-type claim," and thus for an override of immunity.

In any case, the problem with the Sixth Circuit's approach does not turn on how broadly it extends its as-applied theory of abrogation, as any as-applied approach requires at least some attempt to classify a given claim, thus opening the door to factfinding and more. This uncertainty harms plaintiffs as well as State defendants, for it does not ever resolve whether a given plaintiff should file a claim in state or federal court. Rather, each plaintiff is implicitly encouraged to try her luck with an as-applied claim, and after years of litigation, may fail in her federal efforts, leaving her

then—if she wishes to pursue money damages—to belatedly turn her attention to state court if she still can.

Thus, the practical unworkability of the Sixth Circuit's approach warrants this Court's review now, before more cases and more parties go down this perilous path.

C. The Second Circuit's Alternative View Has Also Shown How Any Factbound Approach To Abrogation Is Unworkable.

The Second Circuit's approach differs from the Sixth Circuit's, but it is equally factbound, and thus equally unworkable. The underlying similarity between the Second and Sixth Circuit's approaches shows that the problem of as-applied abrogation is not isolated, but is part of a new trend that warrants review.

While the Sixth Circuit attempts to divide cases into categories of equal protection and due process, the Second Circuit winnows out cases from federal jurisdiction based on the State's motivation. It allows a Title II plaintiff to overcome a State's immunity if "the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability." *Garcia*, 280 F.3d at 112. The Second Circuit noted that direct proof of such animus is often lacking, so it specifically authorized use of a burden-shifting technique or a motivating-factor analysis. *Id.*, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-58 (1989). Of course, such burden-shifting schemes inherently require discovery or other fact-finding, so the State will rarely if ever be entitled to dismissal under Rule 12(b)(1) for lack of jurisdiction. As long as a plaintiff alleges "discriminatory animus," he will likely proceed to at least the summary judgment stage.

Indeed, since *Garcia*, district courts in the Second Circuit have been sifting evidence at the summary judgment stage to see if a plaintiff raised a scintilla of evidence showing discriminatory animus. *See Hamilton v. City College of the City Univ. of N.Y.*, 173 F. Supp. 2d 181, 185 (S.D.N.Y. 2001) (finding that plaintiff did not allege or "proffer[] any evidence" of discriminatory animus or ill will); *Harris v. New York State Dep't*, 2002 U.S. Dist. Lexis 7179, at *87 (S.D.N.Y. April, 22, 2002) (finding that plaintiff did not allege that the State's action was motivated by irrational animus or ill will). In both *Hamilton* and *Harris*, the district court did note that the requisite discriminatory animus was not properly alleged, but in each case, the court also looked to particular documents or other evidence to see if those items constituted proof of animus. And of course, *Garcia* itself invites a *McDonnell-Douglas* inquiry and more.

Thus, despite the differences in the Second and Sixth Circuit's approaches, both versions of as-applied abrogation raise the same problems, both doctrinally and practically. The harms of the factbound approach are not confined to the Sixth Circuit, and this shows why the Court should not only resolve the long-simmering split over Title II of the ADA, but should also resolve whether Section Five analysis should ever take this as-applied form.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the petition.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

DAVID M. GORMLEY
State Solicitor
STEPHEN P. CARNEY*
Associate Solicitor
**Counsel of Record*
RICHARD N. COGLIANESE
ROBERT L. STRAYER
Assistant Solicitors

Counsel for *Amici* States

July 2002